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February 12, 1999

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Magalie Roman Salas, Secretary
Federal Communications Commission
The Portals - TW-A325
445 Twelfth Street, S.W.
Washington, DC 20554

Re: *Ex Parte* Presentation in CC Docket Nos. 96-98 and CCB/CPD 97-30

Dear Ms. Salas:

Transmitted herewith on behalf of Hyperion Telecommunications, Inc., KMC Telecom, Inc., and RCN Telecom Services, Inc., and pursuant to Section 1.1206(a) of the Commission's Rules, 47 C.F.R. § 1.1206(a) (1997), I hereby provide three copies of an *ex parte* letter sent to Chairman Kennard regarding the above-referenced proceeding.

Should any further information be required with respect to this *ex parte* notice, please do not hesitate to contact me. I would also appreciate it if you would date-stamp the enclosed extra copy of this filing and return it with the messenger to acknowledge receipt by the Commission.

Sincerely,

Richard M. Rindler

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February 12, 1999

Honorable William E. Kennard
Chairman
Federal Communications Commission
The Portals - TW-A325
445 Twelfth Street, S.W.
Washington, DC 20554

Re: Ex Parte
Reciprocal Compensation for Local Exchange Traffic to ISPs
CC Docket No. 96-98 and CCB/CPD 97-30

Dear Mr. Kennard:

On January 28, 1999 the Commission withdrew from its agenda consideration of the application of reciprocal compensation of traffic to Internet service providers ("ISPs") in order to review the impact of the Supreme Court decision, *AT&T Corp. v. Iowa Utilities Board*, issued on January 25, 1999, which restored to the Commission its central role in the implementation of the Telecommunications Act of 1996. On behalf of Hyperion Telecommunications, Inc., KMC Telecom, Inc., and RCN Telecom Services, Inc., we would like to extend our congratulations to the Commission on prevailing before the Court on issues that are key to the development of local competition on a nationwide scale. We also would like to demonstrate to the Commission that *AT&T Corp. v. Iowa Utilities Board* provides a significant opportunity for the Commission to adopt a simple resolution to the issue of reciprocal compensation for traffic to ISPs.

AT&T Corp. v. Iowa Utilities Board reaffirms the Commission's ability to resolve the issue of reciprocal compensation for dial-up traffic between end users and ISPs solely under Section 251(b) of the Act. Because *AT&T Corp.* affirmed the Commission's rulemaking authority over all communications used in connection with the requirements of Sections 251 and 252, the Commission may resolve this matter solely on the basis of providing its interpretation of the obligations of local exchange carriers to pay reciprocal compensation under the Act. It is not necessary for the Commission to decide at this time whether telecommunications between an end user and an ISP are jurisdictionally interstate.[1]

[1]The Commission should not be concerned that adopting this approach would compromise its ability to regulate or otherwise supervise the provision of Internet access services. As the Supreme Court said, "We think that the grant [of authority] in §201(b) means what it says: The FCC

In fact, the Commission need do no more than make clear that its prior ruling on reciprocal compensation supports the view that reciprocal compensation is applicable to local exchange dial-up traffic to ISPs. When the Commission originally considered the scope of local exchange carriers' reciprocal compensation obligations in the *Local Competition Order*, it was faced with an argument from an interexchange carrier ("IXC") that the LEC whose customer originates a long-distance call should pay reciprocal compensation to the IXC that transports that call.[2] The basis for this argument was that nothing in Section 251 specifically limits reciprocal compensation to any particular type of traffic.[3] The Commission rejected the argument -- even though "transport and termination of traffic, whether it originates locally or from a distant exchange, involves the same network functions,"[4] -- because the Act preserved the access charge regime for interexchange traffic. Because "traffic originating or terminating outside of the applicable local area would be subject to interstate and intrastate access charges,"[5] reciprocal compensation obligations would not apply to interexchange traffic. Reciprocal compensation obligations would apply to the transport and termination of local traffic, which under the Commission's analysis, logically represented all traffic other than traffic for which compensation was received through access charges..

The RBOCs and GTE have argued that the Commission's decision in the *Local Competition Order* limited reciprocal compensation to jurisdictionally intrastate traffic. Accordingly, they argue that dial-up calls to enhanced service providers -- who had been exempted from payment of access charges for local exchange service used to provide interstate enhanced services -- were not subject to the reciprocal compensation provisions under the *Local Competition Order*. Although there is no explicit method of compensation for this traffic stated in the *Local Competition Order*, one can easily be inferred from the logic of that decision and the Act. Because reciprocal compensation obligations were applied to all traffic that was not subject to access charges, it follows that reciprocal compensation obligations are also owed for traffic to enhanced service providers. To resolve this issue the Commission only needs to recognize that its *Local Competition Order* failed to include this traffic expressly within the scope of reciprocal compensation obligations, and make that express application now.

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has rulemaking authority to carry out the 'provisions of this Act[.]'" *AT&T Corp. v. Iowa Utils. Bd.*, slip op. at 10. The Act includes specific references to the Internet in Section 230(b). Whatever authority the Commission may have to regulate or otherwise supervise Internet communications may be derived, pursuant to Section 201(b), from Section 230(b). Adopting the approach proposed here does not alter that authority.

[2]*Local Competition Order* at ¶1034.

[3]*Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket No. 96-98, Reply Comments of Frontier Corporation (May 30, 1996) at 19.

[4]*Id.* at ¶1033.

[5]*Id.* at ¶ 1035.

This approach is consistent with recent Commission pronouncements on the topic. In the *GTE ADSL Order*, the Commission specifically cordoned off application of that Order to the issue of reciprocal compensation for dial-up traffic to ISPs.[6] In that Order, the jurisdictional analysis of ADSL dedicated service traffic was considered to be a completely different inquiry from whether reciprocal compensation under Section 251(b)(5) is owed for dial-up traffic to ISPs. Ruling here solely on the issue of reciprocal compensation under Section 251(b)(5) would simply reaffirm that the issue of intercarrier compensation is distinct from any jurisdictional analysis.

This approach is also consistent with the FCC's *amicus curiae* brief in the United States District Court considering BellSouth's appeal of the North Carolina Utilities Commission's decision that BellSouth owed reciprocal compensation to US LEC for the disputed traffic.[7] In that brief, the FCC stated,

> It is unclear whether, or the extent to which, the FCC's resolution of the jurisdictional issue in the GTE tariff proceeding will be relevant to the proper treatment of ISP traffic under the terms of interconnection agreement between BellSouth and US LEC. The FCC notes that the *jurisdictional* issue before it in the tariff proceeding does not involve *application of the reciprocal compensation provisions of section 251(b)(5)* or interpretation of the terms of an interconnection agreement.[8]

The Commission has already decided that interpretation of Section 251(b)(5) is a separate inquiry from a jurisdictional analysis of a particular service.

The virtue of this approach is multi-fold: (1) it makes explicit that reciprocal compensation is owed for dial-up traffic between an end user and an ISP; (2) it leaves undisturbed the 29 state commission decisions,[9] 4 federal district court opinions, and 1 state court opinion that have either held or affirmed holdings that local traffic between an end user and an ISP is subject to reciprocal

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[6]*GTE Telephone Operating Cos., GTOC Tariff No. 1, GTOC Transmittal No. 1148,* CC Docket No. 98-79, Memorandum Opinion and Order, (rel. Oct. 30, 1998) at ¶ 2.

[7]Response of Federal Communications Commission as Amicus Curiae to Motion for Referral of Issue, *BellSouth Telecommunications, Inc. v. US LEC of North Carolina, L.L.C., and The North Carolina Utilities Commission,* Civil Action No. 3:98CV170-MU (W.D.N.C. Aug. 27, 1998) ("*North Carolina Amicus Brief*").

[8]*Id.* at 6.

[9]The 29 state commission decisions apply to 84% of all access lines in the United States. *See,* Trends in Telephone Service, Industry Analysis Division, Common Carrier Bureau, Federal Communications Commission, July 1998, at Table 19.2.

compensation obligations;[10] (3) it is not inconsistent with the *GTE ADSL Order* because, as the FCC recognized, that decision had no bearing on the issue of the application of reciprocal compensation under Section 251(b)(5) of the Act; and (4) it provides the Commission with the latitude to continue to shape future rules regarding reciprocal compensation for traffic to ISPs, IXCs, or any other entities.

The Commission should take an additional step to forestall potential litigation over this issue and to settle financial markets disturbed by the prospects of a cessation of reciprocal compensation payments to competitive LECs. The Commission should make clear that state commissions were correct in finding that reciprocal compensation is owed for local exchange traffic to ISPs based on their conclusions that this traffic is local. Because traffic to ESPs had always been classified as local for regulatory purposes by the FCC, state commissions, and ILECs, the Commission should make clear that it was reasonable for the state commissions to find that this traffic should also be considered local for purposes of reciprocal compensation. It is not necessary for the Commission to decide whether this traffic is *jurisdictionally* local – or interstate – in order to resolve this dispute.

Consistent with this approach, the Commission has taken the position that the local exchange portion of Internet communications should be regulated as local traffic for all practical purposes. In its brief before the United States Court of Appeals for the Eighth Circuit regarding Southwestern Bell's appeal of the Commission's *Access Charge Reform Order,* the Commission stated that it "has found elsewhere that traffic sensitive costs associated with ISP traffic are apportioned to the intrastate jurisdiction under separations rules, and thus are properly recovered under intrastate

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[10]Even if the Commission were to find this traffic to be jurisdictionally interstate, that does not necessarily create a conflict with the 29 state decisions that have found this traffic to be eligible for reciprocal compensation. The Supreme Court recognized that the Telecom Act created a "decidedly novel" regulatory "scheme." Under that scheme,

> Congress has broadly extended its law into the field of intrastate telecommunications, but in a few specified areas (ratemaking, *interconnection agreements,* etc.) has left the policy implications of that extension to be determined *by state commissions*, which -- within the broad range of lawful policymaking left open to administrative agencies -- are beyond federal control.

AT&T Corp. v. Iowa Utils. Bd., slip op. at n.10 (emphasis added). Therefore, if the Commission decides that reciprocal compensation is owed for this traffic, it may appropriately defer the implementation of that decision to the states. Accordingly, if state commissions decide (or have already decided) that such traffic should be treated as local in order to receive reciprocal compensation under interconnection agreements, those decisions are consistent with any FCC ruling and state authority to implement FCC policymaking, regardless of jurisdictional classification.

tariffs."[11] The appropriateness of recognizing state commission authority to supervise rates for local exchange traffic to ISPs was acknowledged:

> Although the Commission could have taken a different approach – perhaps could have even preempted state regulation on grounds that the ISP's "mixed use" networks were inseverable, and almost surely would have done so if a state had prescribed rates that discriminated against the interstate activities of ISPs – its decision to allow the states to regulate the rates ISPs pay for their lines is both reasonable and consistent with precedent. *The Commission in effect treats ISPs as "end users" of local services* and does not require them to pay per-minute access charges.[12]

Thus, there is ample precedent for the Commission to continue to recognize that states have had a clearly established role in determining the compensatory treatment of traffic to ISPs regardless of its jurisdictional classification.[13]

Furthermore, RBOC conduct with respect to this traffic is also consistent with the Commission's prior treatment of calls to ISPs as local for all purposes, except, of course, for the payment of reciprocal compensation. In fact, the record in the proceeding that resulted in the *Local Competition Order* confirms that the ILECs fully understood that reciprocal compensation applied to these calls. In that proceeding, the ILECs vociferously opposed bill-and-keep. Among the many comments summarized in the *Local Competition Order* was this one: "BellSouth further asserts that bill and keep would lead to *no compensation for use of incumbent LEC property and will therefore constitute an uncompensated taking in violation of the Constitution.*"[14] A consequence of adopting

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[11] Brief of Federal Communications Commission, *Southwestern Bell Telephone Co. v. FCC*, (8th Cir.) (No. 97-2618), at 77 (citation omitted).

[12] *Id.* at 81 (citation omitted).

[13] If the Commission considers it necessary to conduct a jurisdictional analysis pursuant to Section 152(a), the Commission should adhere to its own precedent that there is a difference between a jurisdictional analysis and a regulatory analysis. In the *Local Competition Order*, the Commission ruled that even jurisdictionally interstate wireless traffic provided by CMRS providers within a Major Trading Area (MTA) would be subject to reciprocal compensation obligations. *Local Competition Order* at ¶1036. Thus, the Commission has already found that even jurisdictionally interstate traffic or intrastate toll traffic could be considered "local" for the purposes of reciprocal compensation. The same reasoning is applicable to local exchange traffic from an end user to an ISP. Regardless of the jurisdictional classification, the traffic should be considered "local" for the purposes of reciprocal compensation.

[14] *Local Competition Order* at ¶1105 (emphasis added).

the ILEC argument in this proceeding (that reciprocal compensation is not owed for the disputed traffic) is that such traffic would fall in the gap between access charges and reciprocal compensation created by the *Local Competition Order*, and there would be no compensation for *competitive LEC* property. The hypocrisy of the ILEC position in this matter is rather jarring. As further evidence, Bell Atlantic *expressly recognized* that reciprocal compensation would be owed for local traffic to ISPs in its comments in the Local Competition docket. In its comments opposing bill-and-keep, Bell Atlantic not only recognized that traffic to ISPs was local and eligible for reciprocal compensation, but also argued that the rates it would propose for transport and termination of traffic would not be unreasonably high:

> Moreover, the notion that bill and keep is necessary to prevent LECs from demanding too high a rate reflects a fundamental misunderstanding of the market. If these [transport and termination] rates are set too high, the result will be that new entrants, who are in a much better position to selectively market their services, will sign up customers whose calls are predominantly inbound, such as credit card authorization centers and *internet access providers*. The LEC would find itself writing large monthly checks to the new entrant.[15]

The about-face performed by Bell Atlantic, BellSouth, and any of the other ILECs that now seek an intercarrier compensation system that provides no compensation at all is nothing short of egregious anticompetitive behavior.

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[15]Reply Comments of Bell Atlantic filed May 30, 1996, in CC Docket No. 96-98 at 26 (emphasis added).

For all of these reasons, the Commission should make clear that, pursuant to Section 251(b)(5) of the Telecommunications Act of 1996, local exchange carriers are obligated to pay reciprocal compensation for local exchange traffic between an end user and an Internet service provider carried by two or more local exchange carriers.[16] The Commission need not decide at this time whether the particular traffic in question between an end user and an ISP is jurisdictionally local or interstate.

Sincerely,

Richard M. Rindler

Andrew D. Lipman
Richard M. Rindler
Michael W. Fleming

Counsel for Hyperion Telecommunications, Inc.,
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cc: Commissioner Susan Ness
Commissioner Harold Furchtgott-Roth
Commissioner Michael Powell
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[16]If necessary, the Commission may also clarify that it has authority under Section 201(b) to carry out the provisions of Section 230(b) regarding the development of the Internet. *See* note 1, *supra.*